No. 84-183

In The

Supreme Court of the United States

October Term, 1984

ROBERT WAYNE SMITH, D.D.S.,

Petitioner,

vs.

ALASKA DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT, DIVISION OF OCCUPATIONAL LICENSING,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RESPONDENT STATE OF ALASKA'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the State Deprive Petitioner of his Right to Due Process When it Initiated License Revocation Proceedings Eight or More Years After Events Which Formed the Basis of the Revocation Proceeding?

2. Does the Inclusion of Police Reports (Which Were Never Introduced into Evidence, Nor in Any Way Made Part of the License Revocation Proceedings,) Into a Consolidated File Deprive Petitioner of His Right to Due Process, Absent a Showing That These Reports Were Reviewed by Any Decisionmaker?

3. When a Contested License Revocation Proceeding is Heard by a Hearing Officer Alone, Does the Due Process Clause Require the Board of Dental Examiners to Afford the Licensed Dentist an Opportunity to Review and Present Argument Before the Board on the Hearing Officer's Proposed Decision Recommending Permanent Revocation?

4. Did the Alaska Supreme Court Err in Concluding Petitioner's Right to Due Process was Not Violated When, At Two Stages in the License Revocation Proceeding, Ex Parte Contacts Were Made Between the Board and the State's Investigator and Attorneys?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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OPINION BELOW

The Alaska Supreme Court decision and judgment that is the subject of the petitioner's petition for writ of certiorari is Memorandum Opinion and Judgment No. 163, dated May 2, 1984. This unreported case is set forth in full in Appendix A to petitioner's petition.

STATEMENT OF THE CASE

On July 9, 1959, following his successful completion of the Alaska dental examination, petitioner was licensed to practice dentistry and oral surgery in the State of Alaska. Between 1959 and 1968 he practiced dentistry and oral surgery in Anchorage.

The petitioner's lack of professional judgment caused the deaths of four patients. In at least three of those instances, the dental procedure involved was fillings. *See State v. Smith,* 593 P.2d 625, 631-32, n. 2 (Alaska 1979) (Boochever, C.J., dissenting). These acts of malpractice led to the petitioner's conviction on two counts of assault and battery in 1968 and, ultimately, to the revocation of his license ten years later. The petitioner's acts of malpractice are detailed in the Board of Dental Examiners' decision, paragraphs 17-37. (R. 834-844).

As a result of the criminal conviction in 1968, petitioner was required to "surrender" his license. It was at the time of sentencing that an unfortunate, and ultimately costly, misunderstanding arose: was the surrender of the license merely for the period of probation (five years) or forever, with the right of reapplication after the term of probation had been completed? The genesis for this dispute arose in the following exchange:

> THE COURT: Execution of the sentence is suspended and you are placed on probation for a period of five years on condition that you surrender to the District Attorney's Office your license to practice dentistry in the State of Alaska and that you do not during that period of probation apply for reinstatement of your license. . .

[M.O. pronouncing sentence, p. 10].

Later the state's attorney asked for clarification of the surrender of the license:

> MR. BOYKO: But at the present time the surrender of his license would mean that [Dr. Smith] is not to practice in the state, as a dentist or oral surgeon, unless he's relicensed under appropriate procedures for. . .
>
> THE COURT: Limiting provisions, that's correct.
>
> MR. BOYKO: Thank you.

[M.O. pronouncing sentence, p. 12].

The issue was not resolved until petitioner filed suit in 1975 to compel reinstatement of his license and a superior court decision in March 1976 that Dr. Smith was licensed and entitled to resume his practice of dentistry unless and until that license was revoked by the Board of Dental Examiners (hereinafter "the board").

Within a month, on April 23, 1976, the state initiated a license revocation proceeding before the board. (R. 1-7). After a year of pretrial discovery and attempts by petitioner to enjoin the hearing, it commenced before Hearing Officer Roger F. Holmes on May 4, 1977 and was concluded on January 11, 1978. Sixty-one witnesses testified during the course of the hearing, several hundred pages of exhibits were introduced and the transcript of the witness testimony ran to 5,763 pages.

On August 15, 1978, Hearing Officer Holmes issued his recommended decision: that petitioner's license to practice dentistry in the State of Alaska be permanently revoked. (R. 847). On August 18, 1978, the board adopted the proposed decision, making it effective upon service. (R. 848).

Petitioner filed his notice of appeal from that decision to the superior court on October 12, 1978. (R. 860-61). The superior court rendered its decision affirming the board on April 20, 1983. (R. 2037-59). Appeal to the Alaska Supreme Court was taken on May 20, 1983. That court's opinion and judgment was rendered on May 2, 1984.

Ancillary to the revocation proceeding, but relevant to the questions presented by petitioner, was the issuance of a cease and desist order enjoining petitioner's practice pending the conclusion of the disciplinary proceeding. Although the administrative hearing before Hearing Officer Holmes was originally scheduled to conclude in May 1977, presentation of evidence, appeals to the superior and supreme courts, and conflicting schedules led the hearing officer to order a continuance of the hearing until Fall, 1977.

Allegations of recent malpractice, the lack of evidence that petitioner had received any continuing education in his almost ten-year absence from the profession, and the delay in the administrative hearing combined to impel Commissioner of Commerce and Economic Development H. Phillip Hubbard on June 7, 1976 to issue a cease and desist order under state law directing petitioner not to practice dentistry in the state pending the outcome of the administrative hearing. The order further declared that petitioner had the right to request a hearing within 15 days of receipt of the order in which case a further order would be entered.

On June 23, 1977, petitioner filed a complaint and application for injunctive relief from the interlocutory order to cease and desist and a separate tort suit. In-

junctive relief was denied and the hearing on the cease and desist order was held. The modified cease and desist order, which permitted petitioner to practice subject to certain health and safety conditions, was appealed and was ultimately reported as *State v. Smith,* 593 P.2d 625 (Alaska 1979).

These and other related cases, including the board's decision to revoke, were eventually consolidated at the superior court level and the records merged.

With respect to petitioner's questions presented for review in the instant case, the May 2, 1984 Alaska Supreme Court opinion and judgment made the following rulings:

With respect to petitioner's first question, denial of due process because of delay, the court held:

> Dr. Smith had a due process right to be heard at a meaningful time before his license was permanently revoked. *Armstrong v. Manzo,* 380 U.S. 545, 552, 14 L.Ed.2d 62, 66 (1965). That right was not violated. The 1968 license suspension occurred pursuant to a sentencing agreement which Dr. Smith himself approved. Although the state's delay in acting on Dr. Smith's license after 1973 was arguably unreasonable, that delay did not forever foreclose the possibility of holding a constitutionally sufficient hearing. Dr. Smith did in fact receive a hearing before his license was permanently revoked. Our review of the record persuades us that Dr. Smith was accorded a hearing which comported with due process requirements. The delay therefore did not deprive Dr. Smith of his right to a fair hearing.

(Petition, Appendix A, pp. 4-5).

With respect to petitioner's second question for review, the alleged extra-record material used by the hearing officer, the court ruled:

> [T]he state has adequately explained the presence of the evidence in the manila envelope. Dr. Smith has not rebutted the state's assertion that the evidence is in the record as a result of the consolidation of the various appeals and he has not shown that the board actually reviewed this evidence during the revocation proceedings.

(Petition, Appendix A, pp. 13-14).

With respect to petitioner's third question for review, the failure to permit argument before the board on the proposed decision, the court determined:

> We note that Dr. Smith had no statutory or constitutional right to appear and speak before the Board. AS 44.62.500(b) renders this case dissimilar to those cases requiring service of proposed decisions because a statute or regulation specifically affords a party an opportunity to respond to the decision. *See Alaska Transportation Commission v. Gandia*, 602 P.2d 402 (Alaska 1979); *Consumers Water, Inc. v. Public Utilities Commission of Texas*, 651 S.W.2d 335 (Tex. App. 1983). There is also no due process right to be heard since Dr. Smith had an opportunity to rebut the evidence during the actual hearing. *Alaska Transportation*, 602 P.2d at 406; *Leeds v. Gray*, 242 P.2d 48, 54 (Cal. App. 1952).

(Petition, Appendix A, pp. 10-11).

With respect to petitioner's fourth question for review, *ex parte* contacts, the court declared:

> Dr. Smith alleges that the Board had improper *ex parte* communications with the state on four separate occasions. There is no merit to his claims as to the

> first three instances. James Reeves' meeting with the Board was entirely proper. Under *In re Cornelius,* 520 P.2d 76 (Alaska 1974), he could advise the Board on procedural matters.

(Petition, Appendix A, p. 14).

> Finally, we recognize that the state's handling of the petition for reconsideration was questionable, but in view of the Board's subsequent denial of the petition we hold that any error is in the nature of harmless error. There is no evidence that the Board's denial was influenced by DOL Investigator Long's letter.

(Petition, Appendix A, pp. 15-16).

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SUMMARY OF REASONS FOR DENYING WRIT

The decision of the Alaska Supreme Court that is the subject of this petition for a writ of certiorari is in complete accord with both state and federal law. The second and fourth questions surround determinations of fact which were resolved against petitioner. None of the questions presented for review rises to the level of a substantial federal question.

———o———

REASONS FOR DENYING WRIT

(a) The First Question Presented by the Petitioner is not a Substantial Federal Question

Petitioner first asserts that the Alaska Supreme Court's decision conflicts "with the principles announced" by this Court "as to the timely initiation of license revo-

cation proceedings." The Alaska court held that due process was not offended by the delay between the events which formed the basis of the revocation proceeding and the proceeding itself. Petitioner refers this Court to no federal or state cases reaching a contrary result.

Armstrong v. Manzo, 380 U.S. 545 (1965), involved the failure of a mother and her successor husband to notify the divorced father of the pendency of proceedings to adopt the daughter. This Court held that due process required that the divorced father be given advance notice and an opportunity to be heard. *Barry v. Barchi,* 443 U.S. 55 (1979), involved an interim suspension of a licensed horse-racing trainer whose horse had been drugged before a race. This Court held that New York's general presuspension procedures comported with due process, but that the delay between the suspension and the hearing in this case was constitutionally infirm because the brief suspension period precluded the trainer from putting the state to its proof until he had suffered the full penalty imposed.

Neither of these cases is applicable. Petitioner was afforded notice of the hearing, the specific allegations, and an opportunity to fully meet the allegations. Except for a brief period of suspension—the subject of an independent proceeding—petitioner was not deprived of his license until after the hearing on the merits.

Below, petitioner presented no cases holding that the length of time between the malpractice and the revocation proceeding denied due process. Instead, petitioner merely submitted that laches and the statute of limitations, both state issues, barred the proceedings. With regard

to laches, the Alaska Supreme Court concluded that the hearing officer properly took account of the delay and discounted those allegations which were prejudicially affected by the delay.[1] The Alaska court also determined tha the proceeding to revoke was not barred by any statute of limitations.[2]

In summary, the Alaska Supreme Court's decision conflicts with no federal cases on the question raised. The issue, presented below as laches and statute of limita-

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[1] With regard to laches, the intermediate appellate court held that the delay had been prejudicial, but that the hearing officer had taken steps to mitigate the impact. Three counts were disregarded by the hearing officer entirely on that basis. The court was further persuaded by hearing officer's finding that

> Dr. Smith's recollection, as well as that of Mrs. Scott, another former employee and several patients, is sufficiently clear on the major points as raised by the State. . . . I am especially convinced of this in light of the fact that some of the most damaging testimony to Dr. Smith came from several of the witnesses called by him and about whom the doctor made no claim that the facts as reported were inaccurately recalled.

(R. 828).

[2] The general rule is that proceedings before administrative agencies are not civil or penal actions and statutes of limitations do not apply. Anne Arundel County Bar Ass'n, Inc. v. Collins, 325 A.2d 724 (Md. 1974), Bold v. Board of Medical Examiners, 23 P.2d 826 (Cal. 1933), Boyle v. Missouri Real Estate Commission, 537 S.W.2d 1603 (Mo. 1976), Hartman v. Board of Chiropractic Examiners, 66 P.2d 705 (Cal. 1937), Latreille v. Michigan State Board of Chiropractic Examiners, 357 Mich. 440, 98 N.W.2d 611 (Mich. 1959), Saxton v. State Board of Education, 29 P.2d 873 (Cal. 1934), Shea v. Board of Medical Examiners, 146 Cal. Rptr. 653 (1978), Sinha v. Ambach, 91 A.D.2d 703, 457 N.Y.S.2d 603 (N.Y. App. 1982), Spray v. Board of Medical Examiners, 624 P.2d 125 (Or. App. 1981), Unnamed Physician v. Commission on Medical Discipline, 400 A.2d 396 (Md. 1979).

tions, is properly reserved for state court determination. It raises no substantial federal question.

(b) The Second Question Presented by the Petitioner is not a Substantial Federal Question

The second question raised by petitioner arises from the inclusion of a manila envelope containing police reports which was apparently contained in one of the boxes in which the agency record was enclosed and forwarded to the clerk of court in May 1982. The police reports were part of the record in the cease and desist order hearing involving petitioner, a case which was consolidated with the revocation proceeding at the superior court level. From this set of circumstances, petitioner seeks to construct the possibility that either the hearing officer or the board reviewed the extra-record materials four years earlier.

Petitioner, despite extensive opportunity for discovery accorded him by the intermediate appellate court, took no steps to demonstrate that the police reports had been reviewed by any decisionmaker. The Alaska Supreme Court noted that petitioner had failed to rebut the state's assertion that the police reports were included as a result of consolidation and had failed to show that the board actually reviewed this evidence during the revocation proceedings.

Petitioner refers this Court to no authority, state or federal, which conflicts with the Alaska Supreme Court's disposition of this issue. It cannot, therefore, be said to be a substantial federal question.

(c) The Third Question Presented by the Petitioner is not a Substantial Federal Question

The third question raised by the petitioner arises out of his claim that he was entitled to make argument to the Board of Dental Examiners before it acted upon the recommended decision of its hearing officer. Petitioner claims that due process requires such an opportunity. The Alaska Supreme Court held otherwise, "since Dr. Smith had an opportunity to rebut the evidence during the actual hearing." (Petition, Appendix A, pp. 10-11).

Petitioner relies upon this court's holding in *Gonzales v. United States,* 348 U.S. 407 (1955), in support of his assertion that the Alaska high court has misapprehended constitutional constraints. This reliance is misplaced. *Gonzales* involved a draft registrant who, having been denied conscientious objector status, was convicted of violating the Universal Military Training and Service Act after refusing to be inducted. The Department of Justice, acting in an adversarial role to the registrant, failed to supply him a copy of its recommendation to the appeal board or to provide him an opportunity to rebut the adverse recommendation before the appeal board took final action. The registrant argued, and this Court agreed, that the failure to provide the recommendation and an opportunity to be heard was contrary to due process of law. In making this ruling, the Court stressed the importance of the right to rebut contentions made by an opposing party. *See Gonzales,* 348 U.S. at 414, n. 5.

The Alaska Supreme Court's decision in no respect contradicts this holding. In this case, the hearing officer, unlike the Department of Justice in *Gonzales,* was not

acting in the role of an adverse party. Rather, the hearing officer was acting as an impartial adjudicator. As such, his recommended decision to the board, issued after hearing evidence and argument by both sides, does not fall within the rule set out in *Gonzales.*

Petitioner does not contend that he was denied an opportunity to be informed of the charges against him by the division of occupational licensing or the evidence upon which those charges were based or the right to fully rebut the evidence and to argue his case before an officer of the board. All these rights were accorded him. What petitioner argues is that he be guaranteed a right to argue his case twice before the same board. Neither *Gonzales* or any other decision of this Court has so held.

The only case noted by petitioner which reaches a holding contrary to that of the Alaska Supreme Court is *Robinson v. Kentucky Health Facilities,* 600 S.W.2d 491 (Ky. App. 1980). Here the state intermediate appellate court purported to rely on *Gonzales, supra,* in concluding that "it is mandatory that an opportunity for the license holder to review the recommendations [of the hearing officer] and file exceptions be granted. . ." 600 S.W.2d 493. This holding goes far beyond *Gonzales* and would, if so extended, require not one, but two hearings at the administrative level. Furthermore, if after having presented one's case to a hearing officer, serving as the trier of fact, a petitioner were accorded the right to argue the facts before the agency itself, the agency would be unable to reach an informed decision on the issues raised in argument without an independent review of the entire record. While such a review may be appropriate in some cases—at the discretion of the agency—a wholesale en-

grafting of such a requirement would cause another slowdown in the adjudicative process at the administrative level, a process intended to be a speedy and more informal alternative to the judiciary's courtroom.

California's courts confronted this issue early on. In *Dami v. Department of Alcoholic Beverage Control,* 1 Cal. Rptr. 213 (Cal. App. 1959), the court commented:

> Appellant's two constitutional arguments are aspects of the same syndrome since the preliminary right of protest as to the proposed decision would call for resort to the record at this point to resolve any conflicts or error. Appellant in substance contends for the right of the accused to protest the content of the proposed decision and the obligation of the agency to consult the record before resolving the issue.
>
> * * *
>
> Due process cannot become a blunderbuss to pepper proceedings with alleged opportunities to be heard at every ancillary and preliminary stage, or the process of administration itself must halt. Due process insists upon the opportunity for a fair trial, not a multiplicity of such opportunities.

1 Cal. Rptr. at 217.

Other state cases submitted by petitioner are inapposite. *Hodge, M.D. v. Department of Professional Regulation,* 432 So.2d 117 (Kan. App. 1983), involved a disciplinary proceeding before the board of medical examiners. On cross appeal, the state appellate court was asked to hold that the board had erred because it allowed Dr. Hodge to address it before determining his penalty. This the court refused to do, simply finding that the board had discretion to permit argument. However, contrary to petitioner's implication, the court made no determination

that due process required the opportunity to make argument to the board.

Petitioner also refers this Court to *Consumers Water, Inc. v. Public Utility Commission*, 651 S.W.2d 335 (Tex. App. 1983). In that case, the state court reversed an agency decision because it had failed to provide the applicant an opportunity to argue its case before the agency. Petitioner neglects to inform this Court that the basis for the reversal was not due process—it was a failure to comply with a statute which expressly provided for a party who is adversely affected by a proposed decision to file exceptions and present briefs to the officials ultimately rendering the decision.

In short, the Alaska Supreme Court's ruling on this question does not conflict with any federal cases or with any state court of last resort.

(d) The Fourth Question Presented by the Petitioner is not a Substantial Federal Question

Petitioner alleges that he was denied due process because of two *ex parte* contacts between representatives of the state and the board of dental examiners. The first contact involved advice rendered by a state assistant attorney general on a procedural matter, specifically, the board's option to sit and hear the case itself or to delegate the hearing function to a hearing officer sitting alone. The second instance surrounded a letter from a staff member to the board of dental examiners. The board had previously revoked petitioner's license to practice dentistry. The letter accompanied petitioner's request for reconsideration and recommended its rejection as untimely.

The Alaska Supreme Court found no impropriety in the first contact. With respect to the second, it concluded that "the state's handling of the petition for reconsideration was questionable," but held that it was in the nature of harmless error because there was no indication that the board's subsequent denial of the petition was in any way influenced by the *ex parte* contact.

The Alaska court's holding in this case is consistent with its own prior determinations on this point, *In the Matter of Robson,* 575 P.2d 771 (Alaska 1978), *In Re Cornelius,* 520 P.2d 76 (Alaska 1974). These cases stand for the proposition that one may not simultaneously wear the hat of prosecutor and adjudicator on the merits in the same case. At the same time, due process is not offended when the prosecutor renders advice to the adjudicator on purely procedural matters. These decisions are in keeping with this Court's decision in *Withrow v. Larkin,* 421 U.S. 35 (1975). Petitioner refers this Court to no case reaching a contrary conclusion.[3]

CONCLUSION

The petitioner has failed to sustain its burden of establishing that there are special and important reasons why the writ should be granted. None of the questions presented by the petitioner involves a substantial fed-

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[3] See Neuberger v. City of Portland, 607 P.2d 722 (Or. 1980), rejecting a mechanical rule that any ex *parte* contact touching upon a matter before a tribunal acting quasi-judicially renders the tribunal, or its affected members, unable to act in that matter.

eral question. Nor is there any federal case which conflicts with the Alaska Supreme Court's decision in this matter. Moreover, the decision is plainly right and is fully supported by both state and federal law. Therefore, petitioner's request for a writ should be denied.

Respectfully submitted,

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